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No. [redacted] 15

In the Supreme Court of the United States

October Term, 1948

[redacted]

Petitioner,

vs.

[redacted]

Respondent.

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 830

ARTHUR G. BOGARDUS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 21–34) is not reported. The opinion and dissenting opinion of the Circuit Court of Appeals (R. 92–96, 97–98) are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1937 (R. 113). The petition for writ of certiorari was filed March 20, 1937. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in affirming the determination of the Board of Tax Appeals that the sum of $10,000 received by the taxpayer in 1931 constituted compensation for personal services rather than a gift.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.
>
> (b) *Exclusions from gross income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:
>
> * * * * *
>
> (3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from

such property shall be included in gross income);

* * * * *

STATEMENT

The facts found by the Board are as follows (R. 16–21):

Petitioner had been employed by the Universal Oil Products Company, herein referred to as Universal (R. 16). Universal was a South Dakota corporation organized in 1914. Its only asset in the beginning was an application for a patent on a process for refining petroleum and manufacturing gasoline. Later, it acquired other patents and licensed them to various producers on a royalty basis. It received its first royalty payments of a few thousand dollars in 1922. From that time its business improved rapidly, and by 1929 its royalties amounted to about $8,000,000, and in 1930 to about $9,000,000. Early in the year 1931, all Universal stock was sold to the United Gasoline Corporation for $25,000,000. (R. 16–17.)

In anticipation of this sale, the Unopco Corporation had been organized for the purpose of taking over those assets of Universal which were to be excluded from the sale. Accordingly, and under the terms of the sale agreement of January 2, 1931, cash, securities, accounts receivable, etc., of a value of approximately $4,100,000 were transferred to the Unopco Corporation. (R. 17.)

The Unopco Corporation had been engaged in no business activities up to the time of the sale of

the Universal stock, and since the sale, its only business has been the investment and management of the assets acquired through the sale agreement (R. 17). At the time the sale of the Universal stock was about to be consummated, the shares of stock of Universal and of Unopco Corporation were owned by the same stockholders, with the same proportionate holdings (R. 17). Universal continued to carry on the same business after the stock had been acquired by the United Gasoline Corporation. The stockholders in Unopco Corporation held no stock in Universal nor in the United Gasoline Corporation after the sale was consummated. (R. 17–18.)

A few days after the sale of Universal stock, the stockholders of Unopco Corporation, who were the former stockholders of Universal, held a meeting at which it was proposed that they show their appreciation for the loyalty and support of some of the employees of Universal by making them a "gift" or "honorarium" (R. 17–18). A resolution was formally adopted at a meeting of the board of directors of Unopco Corporation on January 9, 1931, and by the stockholders on January 10, 1931. The latter resolution was as follows (R. 18–19):

> RESOLVED, that the following recommendations made by the Board of Directors to the stockholders of this Corporation in the meeting of the Board of Directors held on January 9, 1931, viz.:
>
> That the sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500.)

be appropriated, paid and distributed as a bonus to sixty-four (64) former and present employees, attorneys and experts of Universal Oil Products Company (the corporation of that name referred to in the meeting of this Corporation held on the fifth and sixth days of January, 1931), in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company; such sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert as the Board of Directors of this corporation shall determine;

be and the same are hereby in all things approved; and

RESOLVED FURTHER, that this Corporation do appropriate, pay and distribute the said sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500) as a bonus to sixty-four (64) former and present employees, attorneys and experts of said Universal Oil Products Company; in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company; said sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert, as the Board of Directors of this Corporation shall determine.

Thereafter, a list of those who were to receive the payments authorized by the above resolution was prepared by the officers of Unopco Corporation. The payments ranged in amount from $500 to $100,000, and those receiving checks were told by the president that the payments were gifts from the stockholders of the corporation and need not be reported in income tax returns. (R. 19–20.) None of the recipients was ever employed by Unopco Corporation, nor by any of the former stockholders of Universal (R. 62–63). It was stipulated that neither Unopco Corporation nor any of its stockholders, nor the stockholders of Universal, was at any time under any legal or other obligation to pay the recipients any salary, compensation, or consideration of any kind (R. 64). Neither Unopco Corporation, Universal, United Gasoline Corporation, nor any of the stockholders of those corporations ever made or claimed any deduction for Federal income tax purposes of the payments made to the taxpayer and others. In the books of Unopco Corporation the payments were charged to surplus account in January 1931. (R. 20.)

Petitioner received $10,000 pursuant to the corporate resolution of January 10, 1931 (R. 20). The Commissioner of Internal Revenue treated the amount as compensation subject to tax (R. 7–10). The Board agreed with the Commissioner, and, on the appeal of petitioner, the Circuit Court of Appeals affirmed the Board's determination.

ARGUMENT

The Board of Tax Appeals decided, after reviewing the evidence, that "the payments made by Unopco to the petitioners and others were additional compensation in consideration of services rendered to Universal and were not tax-free gifts" (R. 33). It is the Board's function to weigh the evidence and declare the result, and, if there is substantial evidence to support the Board's conclusion, it must be accepted. *Elmhurst Cemetery Co. of Joliet* v. *Commissioner,* No. 255, October Term 1936, decided February 1, 1937. The court below said (R. 96): "The answer here is indeed doubtful, but on the whole we should have decided with the Board, had the decision been ours." But even if it had disagreed with the Board's conclusion, the court below would have had no power to substitute its own judgment concerning the facts for that of the Board, inasmuch as there was substantial evidence to support the latter's conclusion. *Helvering* v. *Rankin,* 295 U. S. 123, 131.

The evidence shows, as more fully set out in the statement, that on January 10, 1931, the stockholders of Unopco Corporation adopted the resolution approved by its board of directors the day before, that $607,500 be appropriated and distributed as a bonus to sixty-four persons, among whom was petitioner, in recognition of the valuable and loyal services they had rendered to Universal. Petitioner in 1931 received $10,000 of the sum appropriated. It further appears that Universal had

previously given bonuses to its employees, and that petitioner had received a bonus of $2,000 in 1930 (R. 77). This evidence warranted the Board's conclusion that the payments were taxable compensation received in recognition of services rendered.

In the case of another who participated in the same distribution made by the Unopco Corporation as is here involved, the Circuit Court of Appeals for the First Circuit said that though the evidence was conflicting, the conflict had been determined by the Board and its determination was final. *Walker* v. *Commissioner,* decided February 12, 1937, not officially reported but found in Vol I, Prentice-Hall, Federal Tax Service, 1937, Par. 1191. In still another case, *William F. Hall* v. *Commissioner,* unreported, involving another participant in this distribution by the Unopco Corporation, the Circuit Court of Appeals for the Fourth Circuit decided, on April 6, 1937, that the amount received was taxable compensation to the recipient.

The cases cited by petitioner may be, as the court said in the *Walker* case, an aid to the reasoning of the fact-finding body in arriving at a conclusion, but they would not be helpful in a case involving conflicting evidence. Those cases cited by petitioner as being in conflict with the decision below were decided before this Court definitely defined in the *Elmhurst* case, and others therein cited, the powers of the appellate courts in cases coming up from the Board of Tax Appeals.

We submit, further, that even if the ultimate finding of the Board be considered a conclusion of law, it was properly left undisturbed. The conclusion is in accord with the principle that payment for services, even though the payment is entirely voluntary, is nevertheless compensation within the statute. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 730.

The petitioner relies upon four cases as being in conflict with the present one. The first, *Jones* v. *Commissioner,* 31 F. (2d) 755 (C. C. A. 3d), is the principal reliance of petitioner. That case was decided March 22, 1929, several months before the *Old Colony Trust Co.* case was decided. The case of *Blair* v. *Rosseter,* 33 F. (2d) 286 (C. C. A. 9th), was decided June 17, 1929. It is very probable that the court did not have the benefit of the *Old Colony Trust Co.* decision, which was rendered on June 3, 1929. The case of *Lunsford* v. *Commissioner,* 62 F. (2d) 740 (C. C. A. 6th), is distinguishable for the reason, stressed by the court therein, that the taxpayer had neither been in the employ of nor performed services for the donor. The case of *Cunningham* v. *Commissioner,* 67 F. (2d) 205 (C. C. A. 3d), was decided by the same court which decided the *Jones* case, *supra,* and the reasoning in the two cases is similar. The intervening decision of this Court in the *Old Colony Trust Co.* case was not noted by the court in the *Cunningham* case. In so far as the latter decision was based on the ground that the money "was freely given without any legal liability existing to

necessitate such payment" (p. 205) it failed to apply the correct principle of law established by this Court in the *Old Colony Trust Co.* case.

In any view of the case, therefore, the decision below accords with the applicable principles laid down by this Court, whether the case is controlled by the rule limiting the scope of review of decisions of the Board or by the rule of law that payments to employees and former employees may be compensation even though the company was under no legal obligation to make the payments. It appears to be unnecessary that this Court grant certiorari in the instant case in order to reaffirm these principles, which have here been correctly applied.

CONCLUSION

It is respectfully submitted that the decision below is in accord with the applicable decisions of this Court. The petition should, therefore, be denied.

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